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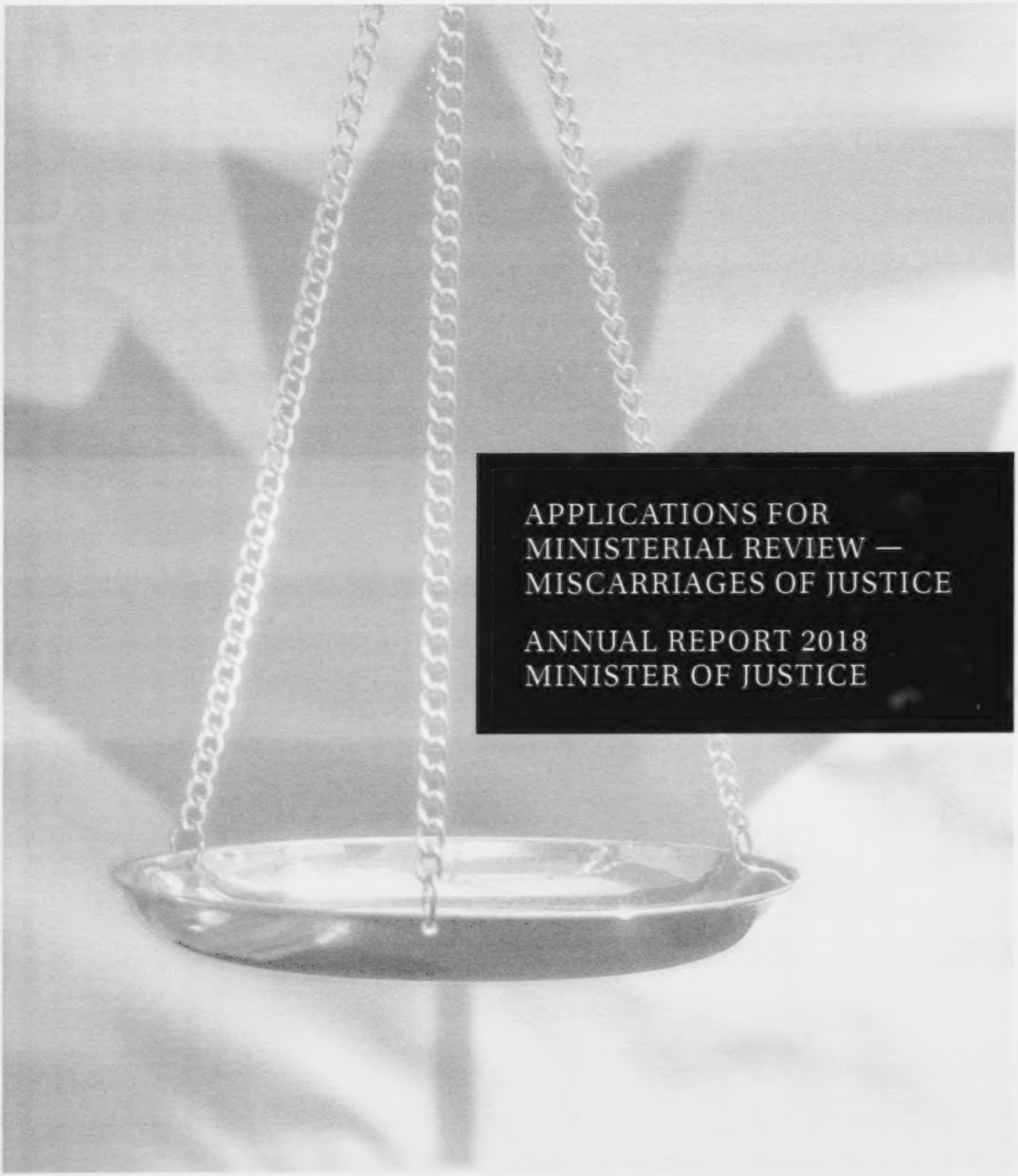

APPLICATIONS FOR MINISTERIAL REVIEW — MISCARRIAGES OF JUSTICE

ANNUAL REPORT 2018 MINISTER OF JUSTICE

Canada

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Introduction

Since 1892, the Minister of Justice has had the power, in one form or another, to review a criminal conviction under federal law to determine whether there may have been a miscarriage of justice. The current regime is set out in sections 696.1 to 696.6 of the *Criminal Code*. The conviction review process begins when a person submits an "application for ministerial review (miscarriages of justice)," also known as a conviction review application.

The Minister must take into account all relevant matters in assessing an application, including whether the application is supported by "new matters of significance"—usually important new information or evidence that was not previously considered by the courts. If the Minister is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred, the Minister may grant the convicted person a remedy and return the case to the courts—either referring the case to a court of appeal to be heard as a new appeal or directing that a new trial be held. The Minister may also, at any time, refer a question to the court of appeal in the appropriate province.

The Minister's decision that there is a reasonable basis to conclude that a miscarriage of justice likely occurred in a case does not amount to a declaration that the convicted person is innocent. Rather, such a decision leads to a case being returned to the judicial system, where the relevant legal issues may be determined by the courts according to the law.

Under section 696.5 of the *Criminal Code*, the Minister of Justice is required to submit an annual report to Parliament regarding applications for ministerial review (miscarriages of justice) within six months of the end of the fiscal year. This is the 16th annual report, and it covers the period from April 1, 2017 to March 31, 2018. Under the *Regulations Respecting Applications for Ministerial Review—Miscarriages of Justice* (the Regulations), the report must address the following matters:

- the number of applications for ministerial review made to the Minister;
- the number of applications that have been abandoned or that are incomplete;
- the number of applications that are at the preliminary assessment stage;
- the number of applications that are at the investigation stage;
- the number of decisions that the Minister has made; and
- any other information that the Minister considers appropriate.

Addressing Possible Miscarriages of Justice

History of the Power to Review Criminal Convictions

Historically, at common law, the only power to revisit a criminal conviction was found in the Royal Prerogative of Mercy, a body of extraordinary powers held by the Crown that allowed it to pardon offenders, reduce the severity of criminal punishments, and correct miscarriages of justice.

Over the years, the Minister's power underwent various legislative changes, culminating in the creation of the former section 690 of the *Criminal Code* in 1968. This section remained in effect for more than 30 years.

The Current Conviction Review Process

In 2002, following public consultations, section 690 of the *Criminal Code* was repealed and replaced by sections 696.1 to 696.6. These provisions, together with the Regulations, set out the law and procedures governing applications for ministerial review (miscarriages of justice).

The revised conviction review process improved transparency and addressed deficiencies in the previous process by:

- including clear guidelines for when a person is eligible for a conviction review;
- providing a straightforward application form and clear direction on the information and documents needed to support it;
- describing the various stages in the conviction review process;
- specifying the criteria the Minister must consider in deciding whether a remedy should be granted;
- expanding the category of offences for which a conviction review is available to include not only indictable offences but also summary conviction offences;
- giving those who investigate applications on behalf of the Minister the authority to compel the production of documents as well as the appearance and testimony of witnesses; and
- requiring the Minister to submit an annual report to Parliament.

The Criminal Conviction Review Group

The Criminal Conviction Review Group (CCRG) is a separate unit of the Department of Justice. It has five main responsibilities:

- liaising with applicants, their lawyers, agents of the provincial attorneys general, the police, and various other interested parties;
- reviewing applications for ministerial review and conducting preliminary assessments;
- conducting investigations where warranted;
- compiling the findings of investigations into an investigation report; and
- providing objective and independent legal advice to the Minister on the disposition of applications for ministerial review.

In conducting its review, the CCRG is not limited to considering only the information provided by the applicant. Information may be uncovered as a result of the CCRG's independent review that was not known to, or put forth by, the applicant. The CCRG may also hire experts or arrange for scientific testing where warranted. Furthermore, pursuant to section 696.2 of the *Criminal Code*, the Minister has the powers of a commissioner under Part I of the *Inquiries Act*. Specifically, the Minister has the investigative power during the conviction review process to subpoena witnesses, documents and other information, and to compel testimony under oath or solemn affirmation. Typically, a CCRG lawyer or outside agent is authorized in writing by the Minister to use these powers, although the CCRG is usually able to acquire the necessary information and documents through voluntary cooperation.

The Special Adviser to the Minister

The Special Adviser to the Minister is appointed by Order-in-Council in accordance with section 127.1(1)(c) of the *Public Service Employment Act* (special adviser to a minister). The role of the Special Adviser is to provide independent advice and make recommendations directly to the Minister of Justice once the investigation of an application is complete. The Special Adviser also provides independent advice and guidance to the CCRG throughout various stages of the conviction review process to ensure that reviews are complete, fair, and transparent, including at the preliminary assessment stage where applications may be rejected.

Mr. Bernard Grenier, a retired judge of the Court of Quebec with more than two decades of distinguished experience on the bench, served as the Special Adviser to the Minister on applications for ministerial review from 2003 until his retirement from the position in 2017. A new appointment is expected in 2018.

Conviction Reviews by Outside Agents

In some circumstances, the Minister may retain an agent from outside the Department of Justice to conduct the review of an application. Typically, this is done where there is a potential conflict of interest.

How the Conviction Review Process Works

Applying for a Conviction Review

The conviction review process requires an applicant to submit a formal application form and a number of supporting documents.

The requirements for a completed application, as well as a description of the various steps in the application process, are set out in detail on the CCRG's website.

Anyone convicted of an offence under a federal law or regulation may submit an application for ministerial review. For example, a person who has been convicted under the *Criminal Code* or the *Controlled Drugs and Substances Act* is eligible to apply. Convictions for indictable and summary conviction offences are both eligible for review. A person found to be a dangerous offender or a long-term offender under the *Criminal Code* may also submit an application for ministerial review of that finding.

However, an application will not be accepted until the applicant has exhausted all available rights of appeal.[1] Judicial review and appeals to higher courts are the usual ways to correct legal errors and miscarriages of justice. Indeed, the *Criminal Code* specifically allows a court of appeal to overturn a conviction on the grounds that there has been a miscarriage of justice. Convicted persons are therefore expected to appeal their convictions, including ones resulting from a guilty plea, where there are suitable grounds to do so. This may involve seeking an extension of time for leave to appeal. In addition, there may be other legal mechanisms available for correcting a miscarriage of justice in the courts where an individual's case is no longer in the legal system, particularly where the Crown concedes that a miscarriage of justice has occurred.

A conviction review by the Minister of Justice is not a substitute for, or an alternative to, a judicial

[1] *See McArthur v Ontario (Attorney General)*, 2012 ONSC 5773; 2013 ONCA 668 for a discussion of what it means to exhaust one's rights of appeal.

review or an appeal of a conviction. Nor is an application for ministerial review meant to be another level of appeal or a mechanism that would allow the Minister of Justice to consider the same evidence and arguments presented to the courts and substitute his or her own judgment.

In making a decision on an application, the Minister must consider all relevant factors including whether the application is supported by "new matters of significance"—generally new information that has surfaced since the trial and appeal and therefore has not been presented to the courts and has not been considered by the Minister on a prior application. It is highly unlikely that an application will be successful in the absence of such information.

Although it is not required, applicants may seek the assistance of a lawyer or an organization specializing in wrongful conviction issues such as Innocence Canada (formerly the Association in Defence of the Wrongly Convicted or AIDWYC) or the various Innocence Projects throughout the country.

Stages of the Review

There are four stages in the review process: preliminary assessment; investigation; preparation of an investigation report; and the decision by the Minister. They are described in detail on the CCRG's website and in earlier annual reports.

As a practical matter, the Minister is not personally involved in the preliminary assessment, investigation, and preparation of the investigation report stages. These stages are usually carried out on behalf of the Minister by the CCRG. The Minister does, however, personally decide on all applications for ministerial review that proceed to the investigation stage.

In this final stage, the Minister of Justice personally reviews the investigation report and supporting materials, which typically include the submissions from the applicant and the prosecuting agency (usually the provincial attorney general), the legal advice and recommendations of the CCRG or outside agent, and the legal advice and recommendations of the Special Adviser.

The Minister then decides to grant a remedy or dismiss the application. In arriving at a decision, the Minister must take into account all relevant matters, including:

- whether the application is supported by new matters of significance that were not considered by the courts or by the Minister in a previous application for ministerial review;
- the relevance and reliability of information that is presented in the application; and
- the fact that an application for ministerial review is not intended to serve as a further appeal and that any remedy available on such an application is an extraordinary remedy.

In some circumstances, an application may raise a question on which the Minister may request the assistance of a court of appeal. The court's opinion on the question may help the Minister make the decision. The Minister, therefore, has the legal authority, at any time and prior to any decision, to refer a question or questions about an application to the court of appeal for its opinion. Typically, the court of appeal's opinion would be sought on a legal issue central to the application, such as the admissibility of fresh evidence.

If the Minister is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred, pursuant to subsection 696.3(3) of the *Criminal Code*, the Minister may order a new trial, or a new hearing in the case of a person found to be a dangerous or long-term offender, or may refer the matter to the court of appeal as if it were an appeal by the convicted person or person found to be a dangerous or long-term offender.

Over the years, guidelines and general principles concerning the exercise of ministerial discretion have been established in various ministerial decisions, and these are still applicable today. Some have in fact been incorporated into the current *Criminal Code* provisions.

1. The remedy contemplated by section 696.1 is extraordinary. It is intended to ensure that no miscarriage of justice occurs when all conventional avenues of appeal have been exhausted.

2. Section 696.1 does not exist to permit the Minister to substitute a ministerial opinion for a trial verdict or a result on appeal based solely on the Minister's view of the same evidence.

3. Similarly, the procedure created by section 696.1 is not intended to create a further level of appeal. Something more will ordinarily be required than simply a repetition of the same evidence and arguments that were put before the trial and appellate courts. Applicants under section 696.1 who rely solely on alleged weaknesses in the evidence, or on arguments of the law that were put before a court and considered, can expect that their application will be refused.

4. Applications under section 696.1 should ordinarily be based on new matters of significance that either were not considered by the courts or occurred or arose after the conventional avenues of appeal had been exhausted.

5. Where the applicant is able to identify such new matters, the Minister will assess them to determine their reliability. For example, where fresh evidence is proffered, it will be examined to see whether it is reasonably capable of belief, having regard to all of the circumstances. Such new matters will also be examined to determine whether they are relevant to the issue of guilt. The Minister will also have to determine the overall effect of the new matters when they are taken together with the evidence adduced at trial. In this regard, one of the important questions will be whether there is "new evidence relevant to the issue of guilt which is reasonably capable of belief and which, taken together with the evidence adduced at trial, could reasonably have affected the verdict."

6. Finally, an applicant under section 696.1, in order to succeed, need not convince the Minister of his or her innocence or prove conclusively that a miscarriage of justice has *actually* occurred. Rather, the applicant will be expected to demonstrate, based on the above analysis, that there is a reasonable basis to conclude that a miscarriage of justice *likely* occurred.

Statistical Information

Reporting Period

The period covered by this annual report is from April 1, 2017 to March 31, 2018.

Inquiries

This category includes people who contact the CCRG for general information about the conviction review process or to request a copy of the booklet *Applying for a Conviction Review* or other information.

During the reporting period, the CCRG received 46 such inquiries.

Applications Made to the Minister

Table 1 indicates the number of applications that the Minister actually received during this reporting period. An application is considered to be "completed" when a person has submitted the forms, information, and supporting documents required by the Regulations. During this reporting period, the Minister received 27 applications. Eighteen of them were completed. The CCRG has thus seen an approximate fourfold increase in the number of completed applications in both 2016/17 and 2017/18, as compared to preceding years.

An application is considered to be "partially completed" where a person has submitted some, but not all, of the forms, information, and supporting documents required by the Regulations. For example, a person may have submitted the application form but not the supporting documents required. Although it is the applicant's responsibility to provide the required documentation, CCRG staff frequently assist those submitting applications. It is not unusual for an application to remain in the "partially completed" category for a period of time while the applicant gathers and submits the necessary documents and information. Of the 27 applications made to the Minister during the reporting period, four fall into the category of "partially completed".

An application is "screened out" if the person is not eligible to make an application for ministerial review. This category covers a variety of circumstances—for example, if an application relates to a provincial offence, involves a civil matter, or deals with the same subject matter as a previously denied application and does not raise any new matters of significance. Five applications were screened out during this reporting period.

TABLE 1: APPLICATIONS MADE TO THE MINISTER

FROM APRIL 1, 2017, TO MARCH 31, 2018	
Applications completed	18
Applications partially completed	4
Applications screened out	5
TOTAL	**27**

Progress of Applications through the Conviction Review Process

Table 2 summarizes the work completed in the first three stages of the conviction review process. Nine preliminary assessments were completed during the period covered by this report. One investigation was completed during the reporting period, and none were abandoned by applicants.

The time required to conduct a preliminary assessment typically ranges from a few weeks to several months. An investigation usually takes a number of months to complete. Both preliminary assessments and investigations can take even longer to complete if the case is particularly complex or a large volume of material has been submitted.

TABLE 2: PROGRESS OF APPLICATIONS THROUGH THE CONVICTION REVIEW PROCESS

FROM APRIL 1, 2017, TO MARCH 31, 2018	
Preliminary assessments completed	9
Investigations completed	1
Applications abandoned	0
TOTAL	**10**

Preliminary Assessments

Tables 3 and 4 provide further information about the work done at the preliminary assessment stage of the conviction review process. Table 3 summarizes the 41 applications that were at the preliminary assessment stage during the reporting period. There were 20 applications awaiting preliminary assessment, and nine were completed. Twelve more were underway but not yet completed. No preliminary assessments were abandoned. A preliminary assessment is considered to be under way if it commenced during the reporting period or if it commenced beforehand but continued during the reporting period.

Table 4 shows that no applications proceeded to the investigation stage following preliminary assessment. The CCRG concluded in each case that there was no reasonable basis to conclude that a miscarriage of justice likely occurred.

Of the 41 applications at the preliminary assessment stage during the reporting period, 27 were from applicants not represented by counsel. Fourteen were represented. Nineteen of the applicants were in custody during the reporting period, while 22 were out of custody.

TABLE 3: SUMMARY OF APPLICATIONS AT THE PRELIMINARY ASSESSMENT STAGE

FROM APRIL 1, 2017, TO MARCH 31, 2018	
Preliminary assessments completed	9
Preliminary assessments abandoned by the applicant	0
Preliminary assessments under way but not yet completed	12
Applications awaiting preliminary assessment	20
TOTAL	**41**

TABLE 4: DISPOSITION OF APPLICATIONS FOLLOWING PRELIMINARY ASSESSMENT STAGE	
FROM APRIL 1, 2017, TO MARCH 31, 2018	
Applications that did not proceed to the investigation stage following a preliminary assessment	9
Applications that proceeded to the investigation stage following a preliminary assessment	0
TOTAL	9

Investigations

Table 5 summarizes the work done on applications that were at the investigation stage during the reporting period. An investigation is considered to be complete when an investigation report is forwarded to the Minister for review and decision.

One investigation was completed during the reporting period and one investigation was carried over from the previous reporting period.

Both applicants were represented by counsel. Both were in custody.

TABLE 5: SUMMARY OF APPLICATIONS AT THE INVESTIGATION STAGE	
FROM APRIL 1, 2017, TO MARCH 31, 2018	
Investigations completed	1
Investigations under way but not yet completed	1
TOTAL	2

Decisions by the Minister

Table 6 summarizes the decisions made by the Minister during the reporting period. No remedies were granted and no applications were dismissed by the Minister.

TABLE 6: DECISIONS MADE BY THE MINISTER	
FROM APRIL 1, 2017, TO MARCH 31, 2018	
Applications dismissed	0
Remedies granted	0
TOTAL	0

Applications Abandoned or Held in Abeyance

During the reporting period, no applications were abandoned at the preliminary assessment stage or at the decision stage. One application was held in abeyance at the request of the applicant, and none were held in abeyance by the CCRG pending a review by provincial authorities. The applicant whose application is being held in abeyance is in custody and represented by counsel.

APPENDIX

Contacting the Criminal Conviction Review Group

Applicants and interested parties are encouraged to communicate with the CCRG in writing. Initial contact may also be made by e-mail.

Mail

Minister of Justice
Criminal Conviction Review Group
284 Wellington Street
Ottawa, Ontario
K1A 0H8

E-mail

Initial inquiries: ccrg-grcc@justice.gc.ca

Telephone

Information for contact by telephone will be provided following the initial contact by mail or e-mail.

CCRG Website

http://www.justice.gc.ca/eng/cj-jp/ccr-rc/index.html